

JAN 04 2007

EMPLOYER STATUS DETERMINATION
CSX Real Property, Inc.

This is the determination of the Railroad Retirement Board concerning the status of CSX Real Property, Inc. (RPI), as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

On January 9, 1997, the Board held that RPI was not an employer under the Acts (B.C.D. No. 97-18). At that time, RPI performed real estate development, sales, and management activities for CSX Corporation, including those relating to surplus or non-operating property owned by CSX Transportation, an employer under the Acts. A majority of the Board, Labor Member dissenting, held that the services involved in managing non-operating property did not constitute services in connection with railroad transportation and, consequently, that RPI was not performing services in connection with railroad transportation. A majority of the Board ruled that RPI's management of operational property constituted casual service.

Information regarding the current operations of RPI was provided by Thomas P. Geis, outside counsel for RPI. According to Mr. Geis, RPI began incrementally shifting away from its "prior business activity of commercial real estate development of non-railroad projects, such as commercial centers, hotels and mixed-[use] developments." This shift is evidenced by the decision by CSX Corporation, RPI's parent, to dispose, in December 2005, of its interest in The James Center, a large commercial real estate project in Richmond, Virginia. RPI's involvement in commercial building activity is no longer an important part of RPI's business activity.

RPI has recently begun to take a much more active role in large real estate transactions for CSXT (B. A. No. 1524). In December 2005, CSX Corporation approved a program to add capacity to the CSXT network. At present there are 62 approved capacity projects, 41 of which involve new track construction. Many of these projects involve real estate acquisition. An example cited by Mr. Geis is RPI employees working on the acquisition of property rights along CSXT corridors to permit expansion of CSXT right of way between Chicago and Jacksonville. RPI is also working on the acquisition of property rights in connection with expansion of the CSXT rail corridor in other congested parts of the CSXT system.

Another example cited by Mr. Geis is RPI's involvement with the state of Florida in connection with that state's potential acquisition from CSXT of a rail line in Central Florida to be utilized by a state-run commuter railroad to serve the Orlando area.

RPI is also involved in a similar transaction elsewhere.¹ Mr. Stephen Crosby, the President of RPI, is heading up the task force dedicated to this project. In a telephone conference call in December 12, 2006, with members of the Board's legal staff, Mr. Gies advised that Mr. Crosby's duties will change significantly after the beginning of calendar year 2007 due to the changed business focus of RPI.²

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

RPI is under common control with a covered rail carrier employer, CSXT. The evidence of record establishes that the business of RPI has undergone an incremental increase in rail-related services and that RPI is becoming substantially engaged in the provision of services in connection with railroad transportation for its affiliate CSXT. Mr. Gies advised in his written request for a coverage determination that RPI estimates that its property acquisition activity in connection with further expansion of the CSXT rail corridor presently accounts for approximately 14% of the work of RPI's employees, and that this percentage will increase over the next several years. Based upon the new focus of the company and its plan for a material difference in the duties of its President and the company's business after the beginning of the year 2007, the Board finds that effective January 1, 2007, RPI will become an employer within the meaning of

¹ Mr. Gies advised in August 2006, CSXT and the State of Florida reached agreement on a non-binding term sheet covering the State's potential acquisition from CSXT. The "similar transaction" was not identified by name because the matter is not yet public.

² The change in business focus was described in the telephone conference call as a reorganization of RPI's business.

section 1(a)(1)(ii) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(ii)) and the corresponding provision of the Railroad Unemployment Insurance Act. (See Rev. Rul. 82-100 (1982-1 C.B. 155), wherein the Internal Revenue Service held that a company became an employer under the Railroad Retirement Tax Act on the date it hired employees to perform functions directly related to its carrier operations.)

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.
(Separate concurring opinion attached)

Jerome F. Kever

CONCURRING OPINION OF V. M. SPEAKMAN, JR
EMPLOYER STATUS DETERMINATION
CSX REAL PROPERTY, INC

In Board Coverage Decision No. 97-18, a Majority of the Board, over my dissent, held that CSX Real Property, Inc. (RPI) was not covered under the Board's statutes, despite the fact that 75% of RPI's revenues was from the sale, marketing and management of CSXT owned property. CSXT, of course, is a common carrier by rail and is covered under our statutes. The Majority dismissed statements from employees of RPI, gathered through a Board audit, that their work was heavily rail connected. The Majority based its decision on representations of RPI that RPI's new emphasis was on managing property rights of CSXT unrelated to rail transportation, such as water rights, optic fiber rights etc. However, it is one thing if such rights appertain to property used on non-rail operations, such as shopping centers or commercial office buildings, and another if they pertain to property used in rail transportation, such as a right-of-way. In the latter case, the sale and marketing of such rights is management of rail property and is a service in connection with rail transportation.

Apparently RPI's focus has shifted, or so it is alleged. However, whether a company is performing services in connection with rail transportation should not be based upon the company's focus, goals or desires, but upon what the company actually does and the financial impact of such activity. Since it was my opinion that RPI's activities have always been substantially connected with the management of CSXT property, and, as such, benefited the carrier, I concur with the result in this case.

Original signed by:

V. M. Speakman, Jr.